

OCT 03 2005**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT****STEVE QUAN, M.D.,****Plaintiff - Appellant,****v.****SMITHKLINE BEECHAM
CORPORATION, d/b/a GlaxoSmithKline,****Defendant - Appellee.****No. 03-56929****D.C. No. CV-02-07657-NMM****MEMORANDUM***

**Appeal from the United States District Court
for the Central District of California
Nora M. Manella, District Judge, Presiding**

**Argued and Submitted September 15, 2005
Pasadena, California**

Before: GRABER, McKEOWN, and W. FLETCHER, Circuit Judges.

Plaintiff Steve Quan appeals from the district court's grant of summary judgment in favor of Defendant on his FEHA disability discrimination claim. On de novo review, Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004), we affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

1. Defendant argues that, as part of his prima facie case, Plaintiff must prove that he was qualified for the position. Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089, 1113 (Cal. 2000). Plaintiff argues that, under Green v. State, 33 Cal. Rptr. 3d 254, 256 (Ct. App. 2005), Defendant bears the burden of proving that Plaintiff cannot perform the essential functions of the job. We need not decide who has the burden here because it is undisputed that Plaintiff does not meet the minimum qualifications for the position and he does not challenge the validity of those qualifications.

2. Plaintiff argues that Defendant may not rely on evidence that his resume was fraudulent because Defendant did not learn of his wrongdoing until discovery in this litigation. However, after-acquired evidence may be used when the employer contests liability on the ground that the plaintiff was never qualified for the job in the first place. Finegan v. County of Los Angeles, 109 Cal. Rptr. 2d 762, 768 (Ct. App. 2001).

3. Finally, even if Plaintiff were qualified and even if the after-discovered fraud were not relevant, he was terminated for legitimate business reasons, to wit, his erratic behavior and reckless driving during the training program. There is no evidence that Defendant's reasons were pretextual.

4. Plaintiff also appeals from the district court's grant of summary judgment in favor of Defendant on his claims for breach of implied-in-fact contract and of the covenant of good faith and fair dealing. Plaintiff signed a letter stating that his employment with Defendant was at-will and that this status could be changed only with express authority. Plaintiff offers no evidence of an implied contract sufficient to overcome the terms of that express written agreement. Guz, 8 P.3d at 1103 n.10. Because the implied covenant of good faith and fair dealing "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement," id. at 1110, there is no basis to sustain Plaintiff's claim.

5. Finally, Plaintiff appeals from the district court's denial of leave to amend the complaint to include a claim under California Government Code § 12940(f). Once a district court issues a pre-scheduling order setting a deadline for amending pleadings, that order "shall not be modified except upon a showing of good cause." Fed. R. Civ. P. 16(b). Because the facts underlying Plaintiff's section 12940(f) claim were known at the inception of the action, more than a year before he sought leave to amend, Plaintiff has not shown good cause. See Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294-95 (9th Cir. 2000).

AFFIRMED.